

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
January 6, 2009 Session

**IN RE: THE ESTATE OF MARY H. HENDRICKSON  
THOMAS H. WARE, ADMINISTRATOR C.T.A. v. FLORENCE  
McKEITHAN v. JOE ROBERT HENDRICKSON, JR.**

**Appeal from the Circuit Court for Davidson County  
No. 03P-1460     Randy Kennedy, Judge**

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**No. M2008-01332-COA-R9-CV - Filed February 25, 2009**

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This is an interlocutory appeal from a civil action initiated by the Administrator of a decedent's estate against the decedent's son to recover assets allegedly misappropriated from the decedent prior to her death. After the Administrator commenced this action, the decedent's daughter sought to intervene and file an Intervening Complaint on behalf of the estate to recover assets against the defendant in addition to those claimed by the Administrator in his Complaint. Pursuant to an agreed order signed by all the parties, the requested intervention was granted and the daughter filed an Intervening Complaint against the defendant on behalf of the estate; the order, however, did not state whether the daughter had a right to intervene pursuant to Tenn. R. Civ. P. 24.01(2) or whether intervention was merely permissive. The defendant contends on appeal that his sister has no right to intervene and that she has no right to assert any claims on behalf of the estate. We have determined the defendant waived the issue concerning intervention by entering into an agreed order stipulating to the intervention. As for the claims the daughter asserted on behalf of the estate, the exclusive right to assert claims on behalf of the estate belongs to the Administrator, and the daughter has failed to establish, as Tenn. R. Civ. P. 24.01(2) requires, that the Administrator cannot adequately represent her interests as a beneficiary of the estate; therefore, the daughter may not assert claims on behalf of the estate. Accordingly, we affirm the stipulation to allow the intervention, reverse the probate court's holding that the daughter may assert claims on behalf of the estate, and remand with instructions to dismiss the Intervening Complaint. The extent to which the daughter may otherwise participate in these proceedings as a permissive intervenor is left to the discretion of the probate court.

**Tenn. R. App. P. 9 Interlocutory Appeal; Judgment of the Circuit Court  
Affirmed in Part; Reversed in Part**

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

Winston S. Evans and Raymond T. Throckmorton, III, Nashville, Tennessee, for the appellant, Joe Robert Hendrickson, Jr.

Joe Gibbs and Luther Wright, Nashville, Tennessee, for the appellee, Florence McKeithan.

## OPINION

The decedent Mary Hendrickson died testate on August 19, 2003. She was survived by her three children, Robert (“Bob”) Hendrickson, Phillip Hendrickson, and Florence McKeithan. The sole beneficiary of her Last Will and Testament was the Mary H. Hendrickson Revocable Living Trust Agreement. The beneficiaries of the Trust are the decedent’s three children.

The decedent’s son Bob Hendrickson (hereinafter “Defendant”) filed a petition to probate his mother’s will in which he and his sister Florence McKeithan were named as co-executors of the estate. As the will directed, the Petition requested that Defendant and Florence McKeithan be appointed co-executors. Ms. McKeithan opposed her brother’s appointment as co-executor by filing an Answer to the Petition for Probate in which she requested the appointment of a substitute personal representative in lieu of Defendant. She also requested that Defendant, who had served as their mother’s attorney-in-fact for the year prior to her death, be required to file a full accounting regarding their mother’s assets, including any assets which he transferred prior to her death.

When the Petition came on for hearing on October 28, 2003, the probate court admitted the decedent’s will to probate; however, the court refused to appoint Defendant or Ms. McKeithan as the personal representative due to the expressed animosity between them. Whereupon, the probate judge appointed an impartial personal representative, the Public Administrator of Davidson County, Thomas H. Ware,<sup>1</sup> as the Administrator, C.T.A.<sup>2</sup>

Ms. McKeithan continued to assert that Defendant had diverted the decedent’s assets for his benefit by unduly influencing his mother and/or used the power of attorney for his benefit in violation of his fiduciary duty. As the administration of the estate progressed, the Administrator concluded that Defendant was indebted to the estate. On March 30, 2007, the Administrator filed this civil action against Defendant, alleging that he exerted undue influence over the decedent in order to obtain gifts, and that he breached his fiduciary duty as attorney-in-fact by diverting his mother’s assets for his own benefit, for which the Administrator sought to recover damages in the amount of \$614,471.

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<sup>1</sup>The principal beneficiary of the estate was the “Mary H. Hendrickson Revocable Living Trust,” of which Mr. Ware had been appointed Successor Trustee by the Probate Court.

<sup>2</sup>Mr. Ware serves as Administrator C.T.A. by the appointment of the probate judge pursuant to Tenn. Code Ann. § 30-1-115. “C.T.A.” is an acronym for *Cum Testamento Annexo*; meaning he serves as an administrator “with the will annexed.” See 2 Jack W. Robinson, Sr., Jeff Mobley & Andrea J. Hedrick, Pritchard on Wills and Administration of Estates § 578, at 75(6th ed. 2007). An administrator appointed with the will annexed is a personal representative that was appointed instead of a named executor. See Tenn. Code Ann. § 30-1-115. An Administrator C.T.A. has the same power and authority as the executor had by the will of the testator. *Id.*; see also 2 Pritchard § 579, at 76.

Ms. McKeithan, however, was dissatisfied with the scope of the Administrator's action, believing that the defendant's diversion of her mother's assets constituted a significantly larger amount than the Administrator sought. Therefore, on June 22, 2007, Ms. McKeithan filed a motion to intervene. She contended she was entitled to intervene as of right pursuant to Tenn. R. Civ. P. 24.01(2), claiming that as a beneficiary of the decedent's estate she had an interest in the property or transactions that formed a basis for the action, that she was so situated that the disposition of the action would impair or impede her ability to protect that interest, and that her interests were not adequately represented by the Administrator. Alternatively, she sought to intervene as a permissive intervenor pursuant to Tenn. R. Civ. P. 24.02. Attached to Ms. McKeithan's motion was a copy of her proposed complaint in compliance with Tenn. R. Civ. P. 24.03.

On August 1, 2007, counsel for all three parties signed an Agreed Order allowing Ms. McKeithan to intervene and file her Intervening Complaint. The Order did not state that she was granted permission to intervene as of right, nor did it state she was being permitted to intervene as a permissive intervenor. Further, the Order did not state that she had a "right" to assert claims on behalf of the estate against her brother; it merely stated that she may intervene and she may file her Intervening Complaint. The Order additionally did not state what role she would play in the subsequent proceedings.

On August 17, 2007, Ms. McKeithan filed her Intervening Complaint and Request for Injunctive Relief. In her Intervening Complaint, she sought to recover, for herself and on behalf of the estate, an itemized accounting of all assets that Mr. Hendrickson "received, disbursed, converted, or mismanaged" during the time he exercised control over the decedent's decision-making. She also asserted the following claims against Mr. Hendrickson: undue influence, lack of mental capacity rendering the deed of trust and power of attorney void, fraud, conversion, and intentional interference with inheritance or gift. Ms. McKeithan also sought injunctive relief prohibiting Mr. Hendrickson from transferring, selling, converting, or disposing of the decedent's assets or any assets of his own during the pendency of the action.

Defendant filed an Answer to the Intervening Complaint on November 29, 2007, challenging Ms. McKeithan's standing to pursue claims on behalf of the estate, contending that only the Administrator and not Ms. McKeithan had the right to pursue those claims. On February 8, 2008, Defendant filed a Motion to Dismiss the Intervening Complaint, on the ground that Ms. McKeithan lacked standing. The trial court entered an order denying Defendant's motion and allowing Ms. McKeithan to intervene "to the extent she sought remedies above and beyond those sought by the administrator." The order also stated that Ms. McKeithan should amend her complaint to reflect that she was seeking relief only on behalf of the estate and not in her personal capacity. Thereafter, Ms. McKeithan filed an Amended Intervening Complaint that complied with the restrictions imposed by the trial court. Defendant then filed a Motion to Dismiss the Amended Intervening Complaint on the ground that Ms. McKeithan lacked standing to assert claims on behalf of the estate. Defendant's Motion to Dismiss the Amended Intervening Complaint was denied. Defendant also filed a motion seeking permission to appeal the foregoing interlocutory order pursuant to Tenn. R. App. P. 9. The trial court granted that motion; nevertheless, it stated that it believed Ms. McKeithan was entitled

to intervene pursuant to Tenn. R. Civ. P. 24.01 to assert the Amended Intervening Complaint. Defendant then filed an application for permission to appeal with this court, which we granted. We shall now address the issues presented.

## ANALYSIS

### PERMISSIVE INTERVENTION OR INTERVENTION AS OF RIGHT

In her Motion to Intervene, Ms. McKeithan sought intervention under Tenn. R. Civ. P. 24.01 and 24.02. Tennessee Rule of Civil Procedure 24.01 provides for intervention in three circumstances:

- (1) when a statute confers an unconditional right to intervene; or
- (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, *unless the applicant's interest is adequately represented by existing parties*; or
- (3) by stipulation of all the parties.

Tenn. R. Civ. P. 24.01 (emphasis added). Tennessee Rule of Civil Procedure 24.02 provides:

Upon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising discretion the court shall consider whether or not the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Tenn. R. Civ. P. 24.02.

Defendant, the Administrator and Ms. McKeithan all entered into an agreed order permitting Ms. McKeithan to intervene in this action. By agreeing to her intervention, Defendant waived his right to challenge Ms. McKeithan's intervention. *See Harker v. Troutman (in Re Troutman Enters., Inc.)*, 286 F.3d 359, 363 (6th Cir. Ohio 2002) (citing *Transamerica Ins. Co. v. South*, 125 F.3d 392, 396 (7th Cir. 1997); *Martindell v. Int'l Tel. & Tel. Corp.*, 594 F.2d 291, 294 (2d Cir. 1979)) (holding "[i]ntervention is a procedural hurdle, rather than a jurisdictional requirement, and as such, can be waived," and finding where the Trustee failed to lodge a timely intervention objection, he affirmatively consented in an Agreed Order, and thereby waived his objection). Thus, Defendant will not be heard to challenge Ms. McKeithan's intervention in this appeal.

Although we find that Defendant has waived his right to challenge Ms. McKeithan's intervention, he did not waive his right to challenge her Intervening Complaint or the claims she may

pursue in this action.<sup>3</sup> See *Conley v. Life Care Centers of America, Inc.*, 236 S.W.3d 713, 724 (Tenn. Ct. App. 2007). Therefore, we must determine whether her intervention was “as of right,” or merely permissive; a distinction which is important because the trial court may place substantial conditions or restrictions on her role in this litigation if she is merely a permissive intervenor instead of an intervenor as of right. See *Beauregard, Inc. v. Sword Services LLC*, 107 F.3d 351, 353 (5th Cir. 1997).

Ms. McKeithan does not have a “statutory right” to intervene pursuant to Tenn. R. Civ. P. 24.01(1). Thus, whether she has a “right” to intervene is dependent upon whether Ms. McKeithan can establish the factors required under subsection (2) of Tenn. R. Civ. P. 24.01. The test for intervention as of right under subsection (2) is as follows:

A party seeking to intervene as of right under Rule 24.01 must establish that (1) the application for intervention was timely; (2) the proposed intervenor has a substantial legal interest in the subject matter of the pending litigation; (3) the proposed intervenor’s ability to protect that interest is impaired; and (4) the parties to the underlying suit cannot adequately represent the intervenor’s interests.

*State v. Brown & Williamson Tobacco Corp.*, 18 S.W.3d 186, 190-91 (Tenn. 2000) (citing *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997)).<sup>4</sup> “The burden of showing that these requirements have been met rests with the would-be intervenor.” *Clark v. Schutte (In re Estate of Lucy)*, No. W2007-02803-COA-R3-CV, 2008 WL 3861987, at \*3 (Tenn. Ct. App. Aug. 20, 2008) (citing *Blount v. City of Memphis*, No. W2006-01191-COA-R3-CV, 2007 WL 1094155, at \*2 (Tenn. Ct. App. April 13, 2007) (citing *Brown & Williamson Tobacco Corp.*, 18 S.W.3d at 191)).

The timeliness of Ms. McKeithan’s application to intervene is not at issue. Thus, the question is whether McKeithan has demonstrated that she has a “substantial legal interest,” whether her ability to protect her interest is impaired, and whether her substantial legal interest cannot be

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<sup>3</sup> Defendant’s agreement that Ms. McKeithan may intervene and file a complaint is analogous to a defendant agreeing that a plaintiff may amend his or her complaint pursuant to Tenn. R. Civ. P. 15.01. By agreeing to permit or not oppose a party’s motion to amend a pleading, the party does not waive the right to challenge the relief sought in the new pleading. As this court stated in *Conley v. Life Care Centers of America, Inc.*, 236 S.W.3d 713, 724, “[i]f the legal sufficiency of the proposed Complaint is at issue - instead of delay, prejudice, bad faith or futility - the better protocol is to grant the motion to amend the pleading, which will afford the adversary the opportunity to test the legal sufficiency of the amended pleading by way of a Tenn. R. Civ. P. 12.02(6) Motion to Dismiss.” *Id.* (citing *McBurney v. Aldrich*, 816 S.W.2d 30, 33 (Tenn. Ct. App. 1991)). The same rationale should apply to a party that permits an absentee to intervene.

<sup>4</sup> In *Brown & Williamson Tobacco Corp.*, our Supreme Court looked specifically to the requirements set forth in Tennessee Rules of Civil Procedure 24.01(2) and to the Sixth Circuit Court of Appeals decision in *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997). *Brown*, 18 S.W.3d at 190-92. The Sixth Circuit evaluated intervention under Federal Rule of Civil Procedure 24(a)(2), which has identical language for intervention as Tenn. R. Civ. P. 24.01(2). *Michigan State AFL-CIO*, 103 F.3d at 1245. Federal Rule of Civil Procedure 24(a)(2) allows intervention for a person “who claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.”

adequately represented by the Administrator. *See* Tenn. R. Civ. P. 24.01(2). In order to intervene, she must establish all of these factors; proving one or more but not all is inadequate. We have determined she has failed to establish two of these factors. For judicial economy, we will only discuss the fourth factor, whether her interest is adequately represented by an existing party, the Administrator.

Important factors in determining the adequacy of representation are how the interest of the absentee compares with the interests of a present party and whether the present party is charged by law with the duty of representing the absentee's interest. *See* 7C Wright, Miller & Kane, Federal Practice & Procedure: Civil 3d, § 1909, pp. 393-95 (2007).

The Administrator, as the personal representative of the decedent's estate, has an affirmative fiduciary duty to marshal and collect the assets of the estate, to enforce choses in action which existed in favor of the decedent, and to distribute the estate to the beneficiaries in a timely manner. *Estate of Doyle v. Hunt*, 60 S.W.3d 838, 844 (Tenn. Ct. App. 2001); *Campbell v. Miller*, 562 S.W.2d 827, 832 (Tenn. Ct. App. 1977). The Administrator, therefore, is charged by law with the duty to represent the interests of the estate and, to the extent of their expectancy interest, the interests of the beneficiaries of the estate, including Ms. McKeithan. Therefore, the interest of the Administrator is essentially identical to that of Ms. McKeithan; to recover assets wrongfully appropriated from the decedent prior to her death.

If an existing party is charged by law with the duty to represent the interests of the absentee then *representation is presumed adequate unless special circumstances are shown*. 7C Federal Practice & Procedure: Civil 3d, § 1909, pp. 400-04 (emphasis added). This principle applies "when there is formal representation by a fiduciary, such as an executor, administrator, or trustee. . . ." *Id.* at 410-11. Furthermore, if the interests of the absentee and existing party are essentially identical and the existing party has a duty to represent the interests of the absentee, that representation shall be deemed adequate unless the absentee makes a "compelling showing" demonstrating why the representation is not adequate. *Id.* at 394-95. Because Ms. McKeithan's interest is essentially identical to that of the Administrator, and the Administrator is charged by law with representing her indirect interest in the estate, Ms. McKeithan must make a compelling showing to demonstrate why his representation is not adequate; otherwise she is not entitled to intervene as of right pursuant to Tenn. R. Civ. P. 24.01(2).

We find that Ms. McKeithan has failed to make a compelling showing demonstrating why the Administrator's representation is not adequate. *Id.* Admittedly, she established that they have substantially different views concerning the relief and the amount of damages to recover from Defendant; however, that alone is insufficient. The Administrator is not obligated to pursue each and every claim desired by one or more beneficiaries of the estate. Although the Administrator has a duty to collect the assets of the decedent's estate, the Administrator must "exercise prudence in doing so," and the Administrator is not required to waste the estate's assets "in doubtful litigation for personal property adversely held, . . . or evidences of debt upon which no recovery can be had." 2 Pritchard §709, at 271. In fact, should the Administrator pursue useless litigation, he may be

personally charged with the costs of such litigation. *Id.* Accordingly, the Administrator has discretion to determine which claims and civil actions are to be pursued, and to what extent they should be pursued.

The Administrator, acting on behalf of the estate, conducted an inquiry concerning the actions of Defendant, after which the Administrator elected to seek the relief sought in the Complaint in the amount of \$614,471 from Defendant. There is a legal presumption that the Administrator is adequately representing Ms. McKeithan's interests, and she has failed to make a compelling showing that her interests are not adequately represented by the Administrator. Based upon the foregoing, we find that Ms. McKeithan has failed to establish that she is entitled to intervene "as of right" pursuant to Tenn. R. Civ. P. 24.01(2). Intervention is either a matter of right or permissive. Therefore, Ms. McKeithan is merely a permissive intervenor.

#### MS. MCKEITHAN'S ROLE AS A PERMISSIVE INTERVENOR

Because Ms. McKeithan is a permissive intervenor, the court may place restrictions on her role in this action. *See Manufacturers Consolidation Serv., Inc. v. Rodell*, 42 S.W.3d 846, 863 (Tenn. Ct. App. 2000); *see also In re NHC – Nashville Fire Litig.*, No. M2007-00192-COA-R3-CV, 2008 WL 4966671, at \*20 n.26 (Tenn. Ct. App. Nov. 21, 2008) (quoting *Harris v. Amoco Prod. Co.*, 768 F.2d 669, 675 (5th Cir. 1985)) ("[T]he permissive intervenor fall[s] somewhere in the gray area between spectator and participant. . . . [T]he intervenor's mere presence in an action does not clothe it with the status of an original party.").

This court examined the ability of a court to place restrictions upon a permissive intervenor in *Rodell*, 42 S.W.3d at 863. In that case we noted the similarities between Federal Rule of Civil Procedure 24(b) and our own Tenn. R. Civ. P. 24.02, which allow for permissive intervention, and looked to the federal courts for guidance on what restrictions might be placed. Quoting from *Beauregard, Inc. v. Sword Services LLC*, 107 F.3d 352 n.2 (5th Cir. 1997) as an example, this court noted that "it is undisputed that virtually any condition may be attached to a grant of permissive intervention." *Rodell*, 42 S.W.3d at 863; (citing *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424 (10th Cir. 1990); *Fox v. Glickman Corp.*, 355 F.2d 161, 164 (2d Cir. 1965); Wright, Miller & Kane, *Federal Practice & Procedure: Civil 2d*, § 1913, § 1922 (1986) ("Since the court has discretion to refuse intervention altogether, it also may specify the conditions on which it will allow the applicant to become a party.")). As Justice Brennan stated in a concurring opinion in *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 94 L. Ed. 2d 389, 107 S. Ct. 1177 (1987),

even highly restrictive conditions may be appropriately placed on a permissive intervenor, because such a party has by definition neither a statutory right to intervene nor any interest at stake that the other parties will not adequately protect or that it could not adequately protect in another proceeding.

*Rodell*, 42 S.W.3d at 863 (citing *Stringfellow*, 480 U.S. at 382 n.1 (Brennan, J., concurring)).

## WHO MAY ASSERT CLAIMS ON BEHALF OF THE ESTATE

The law in Tennessee is clear that upon the appointment of a personal representative, the title to all of the decedent's general personal estate is vested in the representative. *First Nat'l Bank v. Howard*, 302 S.W.2d 516, 518 (Tenn. Ct. App. 1957); see *Union Planters Nat'l Bank & Trust Co. v. Beeler*, 112 S.W.2d 11 (Tenn. 1938). Neither legatees nor distributees acquire any property in the goods of the decedent until the assent of the executor or the administrator is given; they have only an inchoate right to the surplus after payment of the debts. *Howard*, 302 S.W.2d at 518-19. This includes personal property or assets, as well as debts and balances due to the decedent. *Id.* at 518. The title taken by the personal representative is exclusive; and therefore, creditors, legatees, and other interested parties can assert their claims only through the personal representative, who is the legal custodian and owner of the goods. *Id.* at 518-19.

Because the absolute title is vested with the personal representative, only the Administrator has the right to maintain a civil action to recover the debts or other assets due the estate. 2 Pritchard §709 (citing *Bishop v. Young*, 780 S.W.2d 746, 750 (Tenn. Ct. App. 1989)). This includes actions to recover assets taken from the decedent by fraud or deceit. See *Willis v. Smith*, 683 S.W.2d 682 (Tenn. Ct. App. 1984); see also *Owens v. Breeden*, 661 S.W.2d 887 (Tenn. Ct. App. 1983). The law concerning tort actions, such as conversion prior to the death of the decedent, are also exclusive to the personal representative, since this is an exception carved in the law, which used to preclude such actions from being pursued after the death of the person harmed.<sup>5</sup> 2 Pritchard § 716.

In this case, the claims brought by the Administrator seek to recover assets of the decedent's that were alleged to have been improperly converted or misappropriated by Defendant during the decedent's lifetime. These assets include: a note for a Deed of Trust upon real estate owned by Defendant amounting to \$180,000; \$404,471 acquired from her bank accounts; and approximately

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<sup>5</sup>Historically, under the maxim of the common law *actio personalis moritur cum persona*: if an injury was done either to the person or property of another for which damages alone could be recovered, the action died with the person to whom the wrong was done. 2 Pritchard § 716. A personal representative could not sue for a tort committed against the decedent. *Id.* That changed with the enactment of the English statute 4 Edward III, ch. 7, which is a part of our common law, stating "executors shall have an action against trespassers for a trespass done to their testators, as of the goods and chattels of their testators carried away, and recover their damages in like manner as they whose executors they be should have had if they were in life." *Id.* As Pritchard explains:

By an equitable construction of the statute, executors and administrators became entitled to the same actions for any injuries done to the personal estate of the decedent in his lifetime whereby it became less beneficial to the personal representative as the decedent himself might have had, whatever the form of the action.

Consequently, if the goods of the testator or intestate that have been "carried away" remain in *specie*, the representative may have an action in any proper forum to recover them from the wrongdoer. If these have been disposed of, he may sue for money had and received, to recover their value, or may sue for their conversion. . . .

2 Pritchard § 716 (footnotes omitted).



\$30,000 in household furnishings, jewelry, artwork, clothing, and other personal possessions. These claims belong solely to the Administrator, and he is under a duty to pursue them, although he has discretion to determine which claims to pursue. 2 Pritchard § 709.

The probate court authorized Ms. McKeithan to pursue claims against Defendant on behalf of the estate that the Administrator has chosen not to pursue. We have determined this was error because it contravenes the well established law of this State, which for more than two hundred years, has recognized the exclusive right of the personal representative to maintain suits to recover debts due to the deceased, but for two exceptions; where it is established that the personal representative is in collusion with the debtor, or where the personal representative is refusing to take the necessary steps and the debt is about to be lost. *Mason v. Spurlock*, 63 Tenn. 554, 559 (Tenn. 1874); *see Bishop*, 780 S.W.2d at 750; *see also* Story's Eq. Jur., § 581, note 1. Ms. McKeithan has not alleged collusion, and the Administrator is not refusing to take the necessary steps to collect the debt to the extent he deems is reasonable and appropriate to pursue that action. The Administrator has the discretion to decide the scope and nature of the action to pursue against a debtor of the estate and it has not been established that he has abused that discretion. Therefore, Ms. McKeithan has failed to establish a basis upon which she is entitled to assert any claim against Defendant on behalf of the decedent's estate.

If the trial court determines that the Administrator is failing to pursue valid and viable claims on behalf of the estate, instead of permitting Ms. McKeithan to file an Intervening Complaint to assert additional claims on behalf of the estate, the trial court has the authority under Tenn. Code Ann. § 30-1-109(a) to appoint an administrator ad litem to assume the role as the plaintiff in this action in lieu of, but not in addition to, the Administrator to pursue such claims as the Administrator ad litem deems appropriate. Nevertheless, unless and until the Administrator's exclusive right to pursue the claims against Defendant is removed and awarded to an Administrator ad litem, only Thomas Ware, in his capacity as the Administrator, has the right to pursue claims on behalf of the estate against Defendant.

#### IN CONCLUSION

The judgment of the trial court is affirmed in part, reversed in part, and this matter is remanded with instructions to dismiss the Intervening Complaint and for further proceedings consistent with this opinion. Costs of appeal are assessed against Ms. McKeithan and Mr. Hendrickson, jointly and severally.

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FRANK G. CLEMENT, JR., JUDGE